United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-1350

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- ANTHONY BERNARDEZ, Appellant.	Docket No. 74-1350

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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QUESTION PRESENTED

Whether Faruolo's consent to search his home was given freely and voluntarily.

STATEMENT PURSUANT TO RULE 28(3)

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (the Honorable Edward R. Neaher) rendered on March 8, 1974 after a guilty plea convicting Anthony Bernardez of conspiracy to receive and possess stolen property, in violation of 18 U.S.C. §§371, 569.

Appellant was sentenced to a probationary term of three years to commence after his release from state prison.

The Legal Aid Society Federal Defender Services Unit was continued as counsel on appeal pursuant to the Criminal Justice Act.

Statement of Facts

Appellant and seven others* were charged with participation in a scheme to receive and possess a truckload of women's clothing stolen in interstate commerce.

Prior to trial, counsel for all the defendants sought to suppress the evidence seized from Faruolo's house on the ground that Faruolo's consent to search the premises was not freely given. The seized merchandise, which was dis-

*The other defendants were John Pastore, Richard Marco Jr., Frank Felumero, William Faruolo, Vincent DiModico, Lester Sellitti, and Joseph Bruns.

covered immediately following the arrest of appellant and the others who were in or nearby the premises, was the sole evidence of the crimes charged.

At the suppression hearing, F.B.I. Agent John Egan testified that on August 10, 1972 he was notified that a truckload of women's apparel had been hijacked (25*). Later that day, and again on August 14, 1972, Egan was told by informants that Pastore and another man named "Richie" (later identified as Marco) had stolen the loan (28-34).

On August 14, 1972 Egan went to Marco's Staten Island home. There Egan observed a rented U-Haul truck (35). At about 11:15 a.m. the truck, followed by a green Cadillac, were driven toward New Jersey (37). Egan lost sight of the truck after following it for several minutes, but soon thereafter found it in front of 14 La Salle Street, Staten Island, which later was realized to be the residence of Faruolo (37). Egan then observed the truck being unloaded (38).

At about 12:45 p.m., after the unloading was completed, Egan observed the truck being driven away followed by a Pontiac. The two vehicles parked near Marco's house, where

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*Numbers in parenthesis refer to pages of the suppression hearing.

the driver of the truck, later identified as Marco, joined the two men in the car, who were subsequently identified as co-defendants DiModica and Sellitti (40). The three men then drove to a diner, where they talked with co-defendant Pastore, whom agent Egan had previously arrested for truck hijacking (40-41).

Following the meeting at the diner, the various participants drove away in two cars. Egan, who was then in radio contact with other agents, testified that Marco was driven to his home by Pastore. Marco then drove a second U-Haul truck to Faruolo's home (44). There, at about 2:15 p.m., several defendants, including appellant, began unloading the truck (45).

At about 4:00 p.m., Egan and the other agents on the surveillance team observed that the men who had unloaded the truck were apparently finished and had entered two cars parked beside the house (47)*. At that point, the agents moved in and arrested everyone whom they had observed as participants in the unloading.

As the arrests were in process Agent William Edwards went behind the house where he found co-defendant Faruolo (161).

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*Also testifying about the arrests was F.B.I. Agent William Edwards. See generally 144-166, and particularly 160.

Edwards, whose gun was drawn and pointing at Faruolo, placed the latter under arrest, advised him of his Fifth Amendment rights, and told him not to say anything until other agents arrived (162).

Egan appeared about five minutes later, at which time Edwards put away his gun (52). Egan then asked Faruolo for permission to search his house and filled out a Consent to Search form in anticipation of permission. He showed the form to Faruolo who refused to sign it (55). At that point, Egan, who described Faruolo as "distressed" but "lucid", told Faruolo that he would return the following morning with a search warrant if Faruolo refused to sign the consent form (57), and furthermore that surveillance would be maintained on the house all night (88). According to Egan, Faruolo hesitated "quite some time" then signed the consent form (58).*

Co-defendant Faruolo, testifying on the consent to search issue, related that he was extremely frightened by Edwards' appearance at the back of the house (255). He stated that he had never been arrested before or otherwise involved with the police (251). His fright was compounded by the belief that his wife and seventeen year old son would be ar-

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*Following the evidence concerning consent, the government offered testimony on Faruolo's confession which occured a half-hour later, and which also was challenged at the suppression hearing (214-237). Appellant raises no issues concerning that confession.

rested, and this fear intensified when Egan said that he had seen Faruolo's son helping to unload the truck. On cross examination, Faruolo described his feelings as follows:

A He put the gun to my head and said I'm under arrest.

Q He put the gun right at the side of your head?

A That's it. I was so scared; I seen the bullets of that gun in my head.

Q How far away from your head was that gun?

A A foot, and the gun was shaking.

THE COURT: The gun was shaking?

THE WITNESS: Yes.

THE COURT: Who was scared?

Q His hand was shaking?

A It was like this (indicating with shaking hand).
I almost died right there, believe me.

Q Did he touch you in any other way?

A No, no, no.

Q Did he tell you to go anywhere?

A Well, when that happened I stood there and I put my head in my hands like this (indicating). I didn't know what happened.

(267-68)

Later in cross examination, Faruolo stated the precise reasons why he signed the consent form:

Q What did the agent tell you about your son?

A They said that they could arrest my son and my wife.

Q Were you afraid that your son would be arrested?

A Definitely I was.

Q Why were you afraid that your son would be arrested?

A Because, because he was 17 years old that day and he is, he is my son, that's good enough reason.

Q Did the agents say to you that they would not let anyone go in and out of the house?

A Yes, they did.

Q Did they say they wouldn't let anyone go in and out of the house with merchandise?

A They said to me if I did not sign these papers no one enters or leaves this house until the following day, unitl they can get a warrant to come in.

Q Did you in fact believe they could get a search warrant?

A I didn't know. All I know is when they said they could take my wife and son away, that's when I changed my attitude.

At the close of the suppression hearing, Judge Neaher ruled that Faruolo's consent was not given in response to coercion or because of submission to authority. Thus, he denied the motion to suppress the evidence:

> In this case, Faruolo was advised of his right to counsel, advised of his right to refuse to consent to the search, advised that the search would not be made without consent, and read the consent to search form in full. He was not coerced, threatened or intimidated. The drawn gun had no lasting effect. There is no basis for concluding that he submitted to the authority of these F.B.I. Agents. He was not in a location instinct with coercion being out of doors in his back yard....
>
> With respect to Agent Egan's statement about securing a warrant, the Court believes that there was sufficient basis for him to believe that a warrant could be obtained. He was not engaging in deceit or trickery.
>
> (387, 385)*

Following the denial of the suppression motion, counsel for the defendants and the Assistant United States Attorney stipulated that the defendants would plead guilty to count two (conspiracy) of the indictment, on condition that the suppression issue be preserved for appeal. The agree-

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*Judge Neaher's entire opinion is annexed as "C" to appellant's separate appendix.

ment also stipulated that the defendants could withdraw their guilty pleas should this Court reverse the ruling on the motion to suppress and that the government would agree to dismissal of count one (substantive) if the Court affirmed Judge Neaher's ruling.

Judge Neaher accepted the agreement, and appellant pleaded guilty to count two.* At the time of his guilty plea, appellant admitted that he was called on the day in question and that he was offered $50 to help unload a truck. He also admitted that he knew the goods were stolen before he began unloading (See transcript November 12, 1972 at 53-55.)

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*This procedure of pleading guilty while preserving an issue for appeal with the agreement of the Assistant United States Attorney and judge has been approved by this court. United States v. Doyle, 348 F.2d 715 (2d Cir. 1965); United States v. Rothberg, 480 F.2d 534 (2d Cir. 1973); c.f. United States v. Selby, 476 F.2d 965 (2d Cir. 1973).

ARGUMENT

FARUOLO'S CONSENT TO SEARCH HIS HOME WAS NOT GIVEN FREELY AND VOLUNTARILY. THUS, THE SEARCH WAS CONDUCTED IN VIOLATION OF THE FOURTH AMENDMENT.

The evidence heard at the suppression hearing established that, after a complicated day-long surveillance, a group of F.B.I. agents arrested several men whom they had observed unloading stolen merchandise from U-Haul trucks into a private house. Appellant was apprehended, along with various co-defendants, as he emerged from the back door of the house and entered an automobile.* Co-defendant Faruolo, the owner of the house, was arrested several moments later in the back yard.

Agent Edwards with gun drawn came upon Faruolo, who was alone at that moment feeding his dog, placed him under arrest, and gave him Miranda warnings. He held the gun on Faruolo for over five minutes until Agent Egan arrived.

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*Appellant's standing to challenge the validity of the search was not questioned below. Clearly, appellant has standing because, having just been observed unloading contraband, he was a "target" of the search. Moreover, he was in or about the premises at the time of the search, and "illicit" possession is a "core element" of the crime charged. United States v. Mapp, 476 F.2d 67, 71 (2d Cir. 1973); Brown v. United States, 411 U.S. 223, 229 (1973).

Egan filled out a Consent to Search form, but Faruolo refused to sign. At that point, Egan said that if Faruolo didn't sign the agents would keep the house under surveillance and return the following morning with a search warrant. Faruolo previously had never been involved with the police and was extremely frightened and disoriented by Edwards' sudden appearance. Faruolo reluctantly signed the consent form because he feared that the agents would arrest his seventeen year old son, whom they allegedly had seen unloading contraband, and because of Egan's representation about being able to get the search warrant.

These facts demonstrate that the government failed to show "clear and convincing evidence" that Faruolo's consent was freely and voluntarily given. United States v. Mapp, 476 F.2d 67, 77 (2d Cir. 1973). Furthermore, since Faruolo was under arrest at the time, the government's burden to demonstrate freedom from coercion was particularly heavy. Ibid at 78; Gorman v. United States, 380 F.2d 158, 163 (1st Cir. 1967).*

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*Since Faruolo was in custody at the time of the consent, Schenecloth v. Bustamonte, 412 U.S. 218 (1973), which was relied upon by Judge Neaher (383), is inapposite. Absent from Schneckloth's non-custodial consent were the "inherently compelling pressures [of custody] which work to undermine the individual's will." Miranda v. Arizona, 384 U.S.436, 467 (1966). This was explicitly recognized by the Supreme Court in Schneckloth at 248.

Faruolo's will to resist giving consent to search his house was overcome in part by Egan's misrepresentation of his authority to obtain a search warrant. He erroneously represented that his authority to obtain a warrant was absolute and solely within his own discretion.

This Court has not spoken directly to the issue of whether an agent's misrepresentation of his ability to obtain a search warran is a circumstance which undermines the will of a person to resist giving consent to search. Similar issues were considered, however, in two recent cases, United States v. Jordan, 399 F.2d 610 (2d Cir. 1968) and United States v. Curiale, 414 F.2d 744 (2d Cir. 1969).

In United States v. Jordan, supra:

> Jordan voluntarily surrendered to F.B.I. agents in Buffalo when he learned that they were looking for him. After receiving full Miranda warnings he waived his right to counsel. During the course of an interview with the agents he stated that he had nothing to hide and that the agents could search his apartments if they wished to do so. About two hours later he executed written consents at the request of the agents. Before he signed the consents he was told that he was not required to sign them, that anything found in the apartments could be used against him, and that he was entitled to counsel. [He also overheard an agent say that if he did not consent a search warrant would be obtained.]
>
> Ibid at 614.

This Court upheld the validity of the consent because Jordan had given oral consent prior to the statement about the warrant:

> These circumstances strongly support the conclusion that the consents were voluntary and the only considerations which would tend to suggest a contrary conclusion are that Jordan was in custody, that he had been told that it would be best to cooperate, and that after the oral consent was given but before the written consents were executed one agent said to another that a warrant could be obtained in any event. Even if the last statement were held to be correct,... it would not vitiate the prior oral consent.
>
> Id.

United States v. Curiale, supra also involved a discussion between an agent and a suspect about the possible future issuance of a search warrant. The agent testified:

> "Mr. Curiale read the form which I presented to him. After reading it, he looked at me and he made a remark, 'If I don't sign this, you are going to get a search warrant.' At that point, I stopped him and said, "I don't want you to sign on that basis. If you are going to sign it, do it voluntarily.' He just looked and signed it."
>
> Ibid at 746.

In sustaining the validity of the consent and search this Court approved of the agent's refusal to threaten Curiale with the specter of a search warrant:

> Curiale's statement concerning the search warrant demonstrated an awareness of his right to resist the agents' search in the absence of a warrant. Although he understood his right, he nevertheless chose to relinquish it. We need not decide whether the voluntariness of that relinquishment would have been compromised by the agents' complete failure to respond to appellant's statement. Here Ahearn's response was sufficient to put the appellant on notice that his consent should not be conditioned on the availability or unavailability of a warrant. There was no duty to disclose that at that particular moment in a continuing investigation there was insufficient evidence to get a search warrant. In any case, it was clear that Curiale knew what he was doing.

Ibid at 747.

Thus, this Court has implicity disapproved the use of threats relating to search warrants as a method to obtain consent to search. Such threats can only have the effect of weakening a person's will to resist giving consent to search, thereby rendering the consent involuntary.

In the present case it is clear from the record that Faruolo's consent to the search was given because of the misrepresentation by Egan as to his ability to obtain a search warrant. Hence, the consent was a product of Faruolo's overborne will.

CONCLUSION

For the above-stated reasons, the judgment below should be reversed and the indictment dismissed.

Respectfully submitted,

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Certificate of Service

May 7, 1974

I certify that a copy of this brief and appendix has been mailed to the Acting United States Attorney for the Eastern District of New York.

William Epstein